Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)	)	CC Docket 01-338

OPPOSITION OF Z-TEL COMMUNICATIONS, INC. TO PETITION FOR FORBEARANCE OF VERIZON

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Verizon's petition for forbearance principally reargues its contention that the section 271 checklist does not establish independent unbundling obligations applicable to Bell Operating Companies (BOCs). Instead, Verizon argues, BOCs need not unbundle an element listed on the checklist if the Commission determines under section 251(d)(2) that competitors are not impaired without access to the element.

That is not a plausible construction of the statute because it renders the checklist items Verizon challenges superfluous. The second item on the section 271 checklist requires BOCs to unbundle network elements that the Commission determines should be unbundled under the standards of section 251. The four checklist items for which Verizon petitions for forbearance specifically require BOCs to unbundle particular elements – loops, transport, switching, and signaling – and the items do so without qualification. Those checklist items have no meaning if they have no effect once an element is not required to be unbundled under section 251. For that reason, Verizon's proposed construction of the statute effectively reads the checklist items at issue out of the statute, contrary to fundamental principles of statutory construction.

Verizon's cursory discussion of the requirements of section 10 similarly amounts to nothing more than an argument that once the requirements of section 251(d)(2) are satisfied, so

too are the requirements of section 10. That argument suffers from the same defect as the first argument: if Congress meant that to be the case, it would not have adopted the checklist items specifically requiring BOCs to provide unbundled access to certain network elements. But it adopted those items, and it did so for good reason. Both the drafters of the market-opening provisions of the 1996 Telecommunications Act and the Supreme Court recognized the advantages the BOCs derived from their long-standing monopolies, and specifically recognized that continuing access to the network elements at issue in this proceeding would be needed to allow competition to flourish.

Verizon's construction of section 10 raises serious constitutional issues. The Constitution does not authorize administrative agencies to sweep away legislative acts, and therefore any exercise of forbearance authority may be unconstitutional under the Presentment Clause and separation of powers principles. In order to avoid such challenges and challenges alleging that section 10 violates delegation principles, the Commission should be careful to construe section 10 to establish significant limits on its authority to overturn statutory provisions that were adopted by Congress and signed into law by the President.

Section 10 should be read to require, with respect to the network elements listed in the section 271 checklist, that forbearance is not warranted until a wholesale market has developed for those elements. That is the most sensible reading of the provision, and its adoption limits the risk that the provision will be held unconstitutional. However, it is not necessary to reach the issue of how section 10 should be construed in order to reject Verizon's petition. As stated above, that petition is based entirely on the argument that Congress' listing of specific network elements in the checklist means nothing, a contention that is plainly wrong.

I. VERIZON'S ARGUMENT THAT THE CHECKLIST ITEMS AT ISSUE CEASE TO APPLY IF THE COMMISSION REMOVES THE CORRESPONDING ELEMENT FROM THE LIST PROMULGATED UNDER SECTION 251(d)(2) LACKS MERIT.

A. The Section 271 Checklist Establishes Unbundling Obligations In Addition To Those Of Section 251.

Section 251(c)(3) (entitled "unbundled access") requires all incumbent local exchange carriers (ILECs) to provide unbundled access to network elements if the Commission determines that unbundling is warranted pursuant to the standards set forth in section 251(d)(2) (entitled "access standards"). The second item on the section 271 checklist requires BOCs to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." Therefore, if the Commission requires unbundling of an element under section 251, item two on the checklist requires BOCs to provide unbundled access to that network element (and to do so at the price set pursuant to the standard set forth in section 252) in order to obtain authorization to provide long-distance service.

Verizon "ask[s] the Commission to forbear from applying items four through six and ten of the Section 271 competitive checklist once the corresponding elements no longer need to be unbundled under Section 251(d)(2)."[1] Those checklist items require BOCs to provide:

> (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.
>
> (v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.
>
> (vi) Local switching unbundled from transport, local loop transmission, or other services.

* * * * *

[1] Verizon Petition at 3.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and transmission.

These items plainly require BOCs to provide loops, transport, and switching on an unbundled basis and to provide nondiscriminatory access to signaling as well. The items (which are set forth above in full) are not qualified by any cross-reference to section 251.[2]

Verizon nevertheless argues that if the Commission decides that a network element need not be unbundled by all ILECs under section 251(d)(2), "the only way to reconcile" sections 251 and 271 is to conclude that, "once an element no longer meets the statutory standard for mandatory unbundling, the corresponding checklist item is satisfied."[3] That is simply not so. By its nature, section 271 singles out the BOCs for special treatment, as the BOCs previously emphasized in challenging the provision on the grounds that it is a bill of attainder and violates the constitutional guarantee of equal protection. If Congress had wished to apply the same rules to BOCs that it applied to other ILECs, it would not have enacted section 271. But Congress did enact additional rules governing BOCs, and therefore it would be contrary to the basic structure of the statute to construe those additional requirements applicable to BOCs to require nothing more than is required of other ILECs.

If the BOCs continue to believe that Congress should not have treated them differently than other ILECs, they may renew their equal protection challenge or their bill of attainder challenge to section 271. But the D.C. Circuit correctly held that "[b]y no stretch of the imagination can it be found that § 271 violates equal protection," even though Congress treated

[2] We noted in our Comments in the Triennial Review proceeding that it was not clear that Congress considered signaling and certain other items on the checklist to be "network elements." Z-Tel Comments, CC Docket 01-338 *et al* (April 5, 2002), at 10 n.14. However, Verizon does not distinguish between signaling and loops, transport, and switching – which Congress clearly considered to be network elements.

[3] Verizon Petition at 7.

the BOCs differently than other ILECs.[4] The court similarly concluded that "it is hard to imagine how § 271 inflicts injury" on the BOCs – a prerequisite to succeeding on a bill of attainder claim.[5] The BOCs' imaginative challenges to section 271 do not pass muster "as a matter of constitutional law . . . or as a matter of common sense."[6] This Commission should not accept those recycled arguments, which it previously rejected and successfully opposed in court.

Because section 271 imposes obligations on the BOCs in addition to those imposed on other ILECs, the conclusion that BOCs must unbundle network elements listed on the section 271 checklist is entirely consistent with section 251, whether or not *all* ILECs must provide unbundled access to those elements under section 251(d)(2). Section 251(d)(2) is a general provision relating to all ILECs and network elements, while the checklist items at issue impose specific duties on BOCs with respect to some network elements in addition to those imposed on other ILECs. General provisions do not override specific ones, and therefore section 251 cannot reasonably be construed to trump the checklist's specific commands governing one subset of ILECs (BOCs) and one subset of network elements (loops, transport, switching, and signaling).

Thus, there is no need to "reconcile" section 251(d)(2) and the section 271 checklist. Even if an element is removed from the list promulgated under section 251(d)(2), BOCs must still provide unbundled access to the element if it is listed on the section 271 checklist. That is how the Commission read these provisions in the *UNE Remand Order*, and that proper construction of the statute was not challenged.[7]

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[4] *BellSouth Corp. v. FCC*, 162 F.3d 678, 692 (D.C. Cir. 1998).

[5] *Id*. at 691.

[6] *Id*.

[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (*UNE Remand Order*), 15 FCC Rcd 3696 (1999), ¶ 468 ("In this Order, we conclude that circuit switching and shared transport need not be unbundled in certain circumstances. Nonetheless, providing access and interconnection to these elements remains an obligation for BOCs seeking long distance approval.")

Indeed, construing the checklist to require only what section 251(d)(2) requires would violate what the Supreme Court has termed a "cardinal principle" of statutory construction: it would render those items "surplusage."[8] The four checklist items at issue have meaning only if BOCs are required to unbundle the elements they list even after those items are not required to be unbundled pursuant to the standards of section 251. As noted above, the second checklist item requires BOCs to unbundle network elements that must be unbundled pursuant to section 251. The checklist items at issue would serve no purpose if they did not continue to have effect after an element was not required to be unbundled pursuant to the standards of section 251(d)(2). Accordingly, not giving the checklist items their plain meaning – that the BOCs must provide unbundled access to those elements, without qualification – would violate one of the most basic and long-standing principles of statutory construction.

Verizon's proposed "reconciliation" of sections 251(d)(2) and 271 therefore is deeply flawed, as a matter of statutory construction: the plain language of the provisions at issue calls for unbundling of the elements they list without qualification; section 271 was not meant to be "reconciled" with section 251 because Congress intended to impose requirements on the BOCs that it did not impose on other ILECs; and the reading Verizon proposes in order to "reconcile" the checklist with section 271 would deprive the checklist provisions at issue of meaning.

In addition, even though the bulk of Verizon's petition for forbearance is devoted to its statutory construction argument, the argument that the checklist items must be "reconciled" with

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[8] As the Supreme Court stated last year in *Duncan v. Walker*, 533 U.S. 167, 174 (2001): "'It is our duty "to give effect, if possible, to every clause and word of a statute."'" *United States v. Menasche,* 348 U.S. 528, 538-539 (1955) (quoting *Montclair* v. *Ramsdell,*107 U.S. 147, 152 (1883)); see also *Williams* v. *Taylor,* 529 U.S. 362, 404 (2000) (describing this rule as a 'cardinal principle of statutory construction'); *Market Co.* v. *Hoffman*, 101 U.S. 112 (1879) ('As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"'). We are thus 'reluctant to treat statutory terms as

section 251(d)(2) is not a forbearance issue. Verizon seems to recognize this fact in the final sentence of its petition, which states that the Commission "should grant the instant forbearance petition" *if* it "concludes that the checklist items establish independent unbundling obligations."[9] If the checklist items did not establish independent unbundling obligations, there would be no need for forbearance. But if the checklist items establish unbundling obligations in addition to those required by section 251(d)(2), it necessarily follows that satisfaction of the requirements of section 251(d)(2) is not sufficient to justify forbearance. Otherwise, the checklist items would not, in fact, establish obligations in addition to those established by section 251, but instead would not be enforced as soon as the relevant unbundling obligation is no longer required under section 251.

B. Congress Made Very Clear That The BOCs Must Provide Access To The Items Comprising The Platform Of Unbundled Network Elements.

In addition to having no merit as a matter of statutory construction, Verizon's proposed interpretation is contrary to the purposes of the Act as explained by its drafters and the Supreme Court. The drafters of the checklist made clear on the Senate floor that BOCs would have to provide the elements comprising the platform for "the reasonably foreseeable future."[10] Senator Pressler, the sponsor of the Senate bill and the Chair of the Senate Commerce Committee, explained the purpose of the checklist as including "those things that a telecommunications carrier would need from a Bell operating company in order to provide a service such as

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Continued . . .
surplusage' in any setting. *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.,* 515 U.S. 687 (1995)."

[9] Verizon Petition at 7.

[10] 141 Cong. Rec. S8,469 (daily ed. June 15, 1995) (statement of Sen. Pressler).

telephone exchange service or exchange access service in competition with the Bell operating company. This competitive checklist could best be described as a snapshot of what is required for these competitive services now and in the reasonably foreseeable future."[11] It is therefore clear that Congress correctly anticipated that competition in local telephone services for residential and small business customers would not develop overnight – and it took care to ensure that the key elements of the BOCs' technological stranglehold over such competition would be unbundled for "the reasonably foreseeable future."[12]

Senator Breaux, a "leading backer of the Act in the Senate,"[13] put it more colloquially. He told the BOCs: "Now, this legislation says you will not control much of anything," but instead "will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network."[14] Almost immediately after telling the BOCs "you will not control much of anything," Senator Breaux listed three of the

[11] *Id.*; *see also* Telecommunications Competition and Deregulation Act of 1995, S. 652, 104th Cong. § 151 (1995), as codified at 47 U.S.C. § 271(c)(2)(B)(iv-vi).

[12] During debate on the 1996 Act, Senator Kerrey observed that "[t]here is much in this legislation . . . that will benefit the American consumer, and that will benefit the American household. But let no one be mistaken …. It may take 9 or 10 years, which is what happened with divestiture. It took us 10 years before people began to say, 'Wait a minute. This is working. Competition is bringing the price down. The quality is going up.'" 141 Cong. Rec. S7,909 (daily ed. June 7, 1995) (statement of Sen. Kerrey). Unfortunately, six years after passage of the Act, so little local exchange competition has emerged for the "American household" that Senator Kerrey's nine- or ten-year time frame now looks optimistic. An important reason for the delay, as the Fifth Circuit concluded, was that "potential entrants were stymied . . . by the uncertainty over the FCC's jurisdiction to implement its local competition order" until the Supreme Court issued its 1999 decision. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 436 n.78 (1999), *cert. granted*, 530 U.S. 1213 (2000), *cert. pet. dismissed*, 531 U.S. 975 (2000). Further uncertainty retarded competitive entry until the Supreme Court rejected the ILECs' challenges to the Commission's pricing rules in the *Verizon* decision. The D.C. Circuit's decision in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), may have upset the certainty that prevailed for ten days following the Supreme Court's decision.

[13] *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1662 (2002).

[14] 141 Cong. Rec. at S8,153 (daily ed. June 12, 1995) (statement of Sen. Breaux).

checklist items at issue: "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services; and next, local transport from the trunk side of local exchange carrier switch, unbundled from switching or other services. Finally, local switching unbundled from transport, local loop transmission, or other services."[15]

The Supreme Court relied on Senator Breaux's explanation in rejecting the BOC's challenge to the Commission's pricing methodology and unbundling rules.[16] As the Court explained, the incumbent LECs own a vast network of bottleneck facilities – including loops, switches, and transport facilities – as a result of their prior status as franchised monopolists.[17] They also controlled, until recently, nearly 100 percent of the customers in their markets, and telecommunications markets are characterized by "network effects," where the value of service is highly dependent on being able to reach large numbers of other subscribers. As the Supreme Court stated: "It is easy to see why a company that owns a local exchange . . . would have an almost insurmountable competitive advantage."[18] The Court concluded that Congress gave "aspiring competitors every possible incentive to enter local retail telephone markets," including the right to lease network elements at cost-based rates.[19]

Moreover, Congress made very clear in the anti-backlsliding provision in section 271 that the BOCs' obligations to provide access to the network elements listed in the checklist continue after a section 271 application has been authorized. The state commissions understand that

[15] *Id*.

[16] *Verizon*, *supra*, 122 S. Ct. at 1661.

[17] *Id*.

[18] *Id*. at 1662.

[19] *Id*. at 1661.

section 271 imposes continuing obligations on the BOCs: each state commission for which a section 271 application has been granted has adopted a "performance assurance plan" "to protect against backsliding after BOC entry in the long distance market."[20] The Commission routinely applauds those efforts, as it did recently with respect to Vermont.[21] And the Commission recognizes its own duty to prevent backsliding.[22] So even though the grant of a section 271 application shows that a BOC has opened its market to competition, it is clear that BOCs must continue to provide unbundled access to network elements. That, of course, makes perfect sense: if the BOCs do not continue to take the steps necessary to open their markets until robust competition has been irreversibly established, those markets will close.

Analysis of the purposes of section 271 thus confirms the conclusion that flows from the analysis of its terms: Congress clearly intended the checklist to impose continuing obligations on BOCs in addition to those imposed on other ILECs. It therefore is clear that Congress did not intend the items at issue to be "reconciled" into surplusage, as Verizon contends. Rather, analysis of Congress' actions and statements concerning the checklist should cause the Commission to hesitate before it concludes that new entrants are not impaired without access to any of the items singled out for special treatment in the checklist. Congress plainly viewed those

[20] *Application by Verizon New England for Authorization to Provide In-Region InterLATA Services in Vermont*, FCC No. 02-118 (2002) (*Vermont 271 Decision*) at ¶ 74 n.256.

[21] *Id*. at ¶ 3 ("[B]y diligently and actively conducting proceedings beginning in 1997 to . . . develop a Performance Assurance Plan . . . the Vermont Board has laid the necessary foundation for our review and approval.").

[22] "Working in concert with the Vermont Board, we intend to monitor closely Verizon's post-approval compliance for Vermont to ensure that Verizon does not 'cease[ ] to meet any of the conditions required for [section 271] approval.'" *Id*. at ¶ 81 (quoting section 271(d)(6)). The Commission made the same point in its order granting BellSouth's applications for Georgia and Louisiana. *See Georgia and Louisiana 271 Decision* at ¶ 307.

elements as the minimum necessary "to provide a service such as telephone exchange service or exchange access service in competition" with an incumbent. [23]

II. VERIZON HAS NOT DEMONSTRATED THAT THE STANDARDS OF SECTION 10 HAVE BEEN SATISFIED.

A. Verizon's Forbearance Argument Merely Repeats Its Erroneous Statutory Argument.

Other than two sentences that simply parrot some of section 10's language,[24] Verizon completely ignores the structure and importance of the forbearance provision. Section 10(a) requires a showing that a provision: (1) is not necessary to ensure that the charges and practices of carriers "are just and reasonable and not unjustly and unreasonably discriminatory;" (2) is not needed "for the protection of consumers;" and (3) can be forborne in a way that is otherwise "consistent with the public interest."[25] Since the incumbents control bottleneck facilities in an industry characterized by network effects by virtue of their relatively recent status as government-sanctioned and protected monopolies,[26] a great deal is needed to protect competitors and consumers and otherwise to show that enforcement of the statute Congress enacted is no longer in the public interest. In addition, section 10(d) specifically provides that "the Commission may not forbear from applying the requirements of section 251(c) and 271 … until it determines that those requirements have been fully implemented." Section 10(d) thus imposes a test for those two provisions, above and beyond the three requirements for forbearance that

[23] 141 Cong. Rec. S8,469 (daily ed. June 15, 1995) (statement of Sen. Pressler).

[24] *See* Verizon Petition at 3.

[25] 47 U.S.C. § 160(a). In section 10(b), Congress instructed the Commission that the public interest inquiry under section 10(a)(3) should focus on whether forbearance "will enhance competition among providers of telecommunications services."

[26] *UNE Remand Order*, *supra*, ¶ 86.

apply to every other provision of the Act. That is appropriate, because those are the two key market-opening provisions of the Act.

Even though forbearance from enforcement of a statutory provision enacted by Congress and signed into law by the President is an unusual power for which Congress established appropriately rigorous standards – and then set an even higher standard for forbearance from enforcement of the items at issue – Verizon does not even try to offer a meaningful construction of those standards. It instead simply repeats its argument that section 251(d)(2) needs to be reconciled with section 271 so that BOCs do not need to provide unbundled access to a network element if other ILECs do not have to unbundle the element. "Where an element no longer meets the Section 251(d)(2) standard for unbundling, forbearance with respect to the parallel checklist item is required by Section 10," Verizon blithely asserts.[27] With respect to the "fully implemented" requirement of section 10(d), Verizon asserts that "the checklist items must be deemed fully implemented even prior to receipt of Section 271 authority, as long as the relevant elements no longer meet the Section 251(d)(2) standard."[28]

Thus, the entirety of Verizon's claim for forbearance depends on its statutory argument that section 271 does not impose unbundling obligations on BOCs in addition to those required of all ILECs by section 251. That is obviously faulty: if the section 271 checklist establishes obligations on BOCs beyond those established by section 251(d)(2) – and there is no need for a forbearance inquiry otherwise – then Congress plainly meant for more to be shown to justify forbearance from the requirements of the checklist than satisfaction of the section 251(d)(2) requirements. If not – if satisfaction of the section 251(d)(2) standards justifies forbearance from

[27] Verizon Petition at 3.

[28] Verizon Petition at 7.

the checklist, as Verizon contends – then the checklist items have no meaning, contrary to a cardinal principle of statutory construction. Verizon's forbearance argument thus adds nothing to its faulty statutory construction argument. Its petition may – and should – be rejected on that basis alone.[29]

B. Forbearing From Enforcement Of The Provisions Of Section 271 At Issue In This Case Would Raise Serious Constitutional Issues.

The forbearance provision is an unprecedented delegation from Congress to the Commission of authority to repeal portions of the Communications Act of 1934, as amended. As the Chairman has stated, there is "something disquieting about Congress delegating broad authority to an independent agency to sweep away a legislative act."[30] In fact, it is likely that a court reviewing an exercise of the Commission's forbearance authority in this case would find a constitutional violation. That risk would be increased if the forbearance provision is given the meaningless construction urged by Verizon.

After the Commission forbears from enforcement of a provision under the authority granted by section 10, it is as if the provision has been repealed. Of course, the Commission cannot then enforce the statutory provision, and Congress specified in section 10(e) that "[a] state commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying." Thus, once the Commission decides to forbear from enforcement of a provision of the Communications Act, it has no force or effect.

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[29] Verizon repeats a number of erroneous arguments from its Triennial Review filings in its forbearance petition, such as arguments that new entrants are not impaired without access to unbundled switching and that the availability of unbundled network elements was authorized by Congress merely a transitional mechanism to full facilities-based competition. We responded to those arguments in our Triennial Review Comments, and will not repeat those arguments here.

[30] *In re Petition of Ameritech Corp. for Forbearance*, 15 FCC Rcd 7066, 7075 (Commissioner Powell, dissenting).

The forbearance provision therefore is similar in critical respects to the line-item veto overturned by the Supreme Court.[31] The line-item veto authorized the President to cancel three categories of statutory provisions within five days after signing a bill into law. Thus, the line-item veto authorized the President to sign a bill but then, in effect, to veto a part of it. The Supreme Court struck down the line-item veto authorization because it altered the procedure set forth in the Presentment Clause.[32] That Clause provides that a bill becomes law if it has passed the House of Representatives and the Senate and is then signed by the President. That Clause authorizes the President to veto a bill, but not to veto parts of a bill.

The Court noted that the Presentment Clause "is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes," but held that "[t]here are powerful reasons for construing constitutional silence on this issue as equivalent to an express prohibition."[33] Because, as a result of the exercise of line-item veto authority, "[i]n both legal and practical effect the President has amended two Acts of Congress by repealing a portion of each," and that process is not specifically authorized by the Presentment Clause, the Court struck down the line-item veto.[34]

Of course, the Presentment Clause does not authorize the Commission to amend Acts of Congress either. Yet the result of the exercise of forbearance authority in this case would be a truncated version of section 271 in which the four items on the section 271 checklist would have no force or effect, just as what emerged in the line-item veto case after the President used his

[31] *Clinton v. City of New York*, 524 U.S. 417 (1998).

[32] Art. I, § 7, cl. 2.

[33] *Clinton*, *supra*, 524 U.S. at 439.

[34] *Id*. at 438.

authority were "truncated versions of two bills that passed both Houses of Congress."[35] To the extent there are differences, it appears that the forbearance provision is more clearly in violation of the Presentment Clause than was the line-item veto. First, the line-item veto involved a delegation of a form of veto power to the President, who has constitutional authority to exercise another form of veto power. The Commission, of course, has no veto power of any sort. The line-item veto provision also required the President to exercise his authority within five days and established a special procedure for Congress to override a line-item veto. The forbearance provision, in contrast, authorizes the Commission, at any time, to exercise authority to sweep away a portion of an Act passed by both Houses of Congress and signed by the President, and the only way for Congress to overturn an exercise of forbearance authority is to enact another law from scratch.

In the Chairman's discussion of constitutional problems raised by the forbearance provision – in a case that did not involve a Presentment Clause challenge, but instead a challenge to the forbearance provision as an unconstitutional delegation of congressional authority – his separate statement observed "if section 10 is constitutionally suspect on this basis, many of the other standards presently applied to justify our regulatory actions are as well."[36] Whatever the merits of that argument in a delegation case, the Court considered and rejected a similar challenge in the line-item veto case. Specifically, the Court noted the Government's argument "that the President's authority to cancel new direct spending and tax benefit items is no greater than his traditional authority to decline to spend appropriated funds."[37] But the line-item veto

[35] *Id*. at 440.

[36] *Separate Statement of Commissioner Powell*, *supra*, 15 FCC Rcd at 7076.

[37] *Clinton*, *supra*, 524 U.S. at 446.

was different, the Court held, because it "gives the President the unilateral power to change the text of duly enacted statutes."[38]

The forbearance provision gives the Commission the same unilateral power. Thus, even though the standards governing the exercise of forbearance authority may be no broader than the standards governing the exercise of rulemaking authority, the Court has drawn a constitutional line prohibiting the effective repeal of Acts of Congress by any method other than that specified in the Presentment Clause. An exercise of forbearance authority in this case therefore likely would result in the invalidation of the forbearance provision under the Presentment Clause.

Because it held the line-item veto provision unconstitutional under the Presentment Clause, the Supreme Court did not reach the more general separation of powers issue presented in that case. But the lower court had struck down the line-item veto on that ground as well. As that court held, "'The lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity.'"[39] The Commission is not Congress. Because the power to enact legislation is not delegable, the only permissible method by which a statutory provision may be amended is by another Act of Congress. It may not be amended by agency action. Accordingly, a substantial constitutional challenge to any exercise of forbearance authority also would arise under separation of powers principles.

Presentment Clause and separation of powers challenges are different than delegation challenges. Under the rules governing delegations of rulemaking authority, agency action is permissible as long as Congress has adopted an "intelligible principle" to channel agency

[38] *Id*. at 447.

[39] *City of New York v. Clinton*, 985 F. Supp. 168, 180 (D.D.C. 1998), *quoting Loving v. United States*, 517 U.S. 748 (1996).

action.[40] While delegation challenges are usually rejected by the courts, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[41] Therefore, a broad grant of discretion may be permissible to justify routine regulatory actions, but a broad grant will not be acceptable to justify more critical agency action. Because the authority to sweep away a provision enacted by Congress falls into the latter category, the courts are likely to demand more definite standards to justify forbearance than they would in cases involving routine exercises of agency authority. And while an agency cannot cure a defective statute by devising an acceptable intelligible principle on its own,[42] an agency can compound the risk that a provision will be held to be an unconstitutional delegation of congressional authority by exercising its ability to construe ambiguous statutory provisions to grant broad authority rather than narrow authority.

In this case, acceptance of Verizon's standardless position could render section 10 unconstitutional on delegation grounds. Verizon argues that the forbearance provision ought to be construed to *favor* exercise of the unprecedented power to sweep away statutory provisions on the ground that less regulation is good, even less regulation of a former monopolist that continues to exercise market power. Other than that, Verizon has offered no principle at all to channel the Commission's discretion under section 10. The "standard" proposed by Verizon – more forbearance is better – does not amount to the sort of intelligible principle needed in a delegation case involving an important exercise of agency authority. Acceptance of Verizon's position therefore would increase the Commission's litigation risk considerably.

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[40] *Whitman v. American Trucking Associations*, 531 U.S. 457, 474 (2000).

[41] *Id*. at 475.

[42] *Id*.

In short, it is likely that the courts would invalidate any exercise of forbearance authority in this case under the Presentment Clause. The authority to "sweep away a legislative act" is not merely "disquieting,"[43] but contrary to the exclusive procedure set forth in the Constitution to govern the repeal of Acts of Congress. Of course, no such challenge would arise in this case if the Commission declines to exercise its forbearance authority. Any exercise of forbearance authority also would be subject to serious challenge on separation of powers and delegation grounds. The latter sort of challenge would be more likely to succeed if the Commission adopts the standardless interpretation of section 10 urged by Verizon. In contrast, a delegation challenge would be less likely to succeed if the Commission adopted an interpretation of the standards of section 10 that channeled its authority, such as the interpretation provided below.

C. Forbearance From Enforcement Of The Checklist Provisions At Issue Is Appropriate Only After A Wholesale Market Has Developed For The Relevant Network Element.

The Commission has not yet had to grapple with application of the standards of section 10(a) to the requirements set forth in the section 271 checklist or with the precise meaning of "fully implemented" in section 10(d). There is no need to do so at this time, since Verizon's forbearance request is grossly premature.

Should the Commission desire to begin to consider what is necessary for forbearance from the checklist requirements, the AT&T non-dominance proceeding provides relevant guidance.[44] As Z-Tel explained in our *Triennial Review* Reply Comments, AT&T was declared to be non-dominant only after the Commission found that AT&T's competitors could absorb almost two-thirds of AT&T's customers within one year; that almost three-quarters of long-

[43] *In re Petition of Ameritech Corp. for Forbearance*, 15 FCC Rcd 7066, 7075 (Commissioner Powell, dissenting).

[44] *In re Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995) ("*AT&T Non-Dominance Order*").

distance resellers used facilities other than AT&T facilities; and that AT&T's share of the relevant market had fallen to below 60%.[45] In contrast, new entrants can absorb nowhere near two-thirds of ILEC residential and small-business customers (particularly if they are forced to rely on manual hot cuts); they have no alternative to using ILEC facilities to provide local service to mass market customers; and ILECs today *still* control about 91% of the local exchange market and an even higher percentage of the residential and small-business market. The Telecommunications Act is only six years old, and the local bottleneck is much more difficult to open to competition than was the long-distance market.

Moreover, the AT&T non-dominance proceeding examined factors that align with a section 10(a) inquiry, focusing on carrier protection, consumer protection, and the general public interest. That is, the Commission made sure, before declaring AT&T non-dominant, that competitors had alternative methods of serving customers other than using AT&T's facilities; that customers had adequate alternatives to service from AT&T; and that those competitive alternatives were firmly established. Significantly, however, Congress – which enacted the 1996 Act shortly after AT&T was declared non-dominant, and thus was likely aware of the Commission's analysis – required more before the Commission could forbear from enforcement of sections 251(c)(3) and 271. With respect to those two provisions, Congress also required a showing that they had been "fully implemented." Accordingly, the Commission must construe the forbearance provision to require that *more* needs to be shown to forbear from enforcement of sections 251(c)(3) and 271 than must be shown to justify forbearance from other provisions of the Communications Act.[46]

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[45] *See* Z-Tel *Triennial Review* Reply Comments at 118-21.

[46] *See* note 8, *supra*.

In our view, sections 251(c) and 271 should not be considered "fully implemented" in a geographic area until there is a mature wholesale market in which competitors may obtain what they need to serve end-users and there is some assurance that the wholesale market will continue to function. A mature wholesale market not only will protect consumers and other competitors, but also will ensure that each mode of entry that Congress authorized in sections 251(c) and 271 – interconnecting facilities, leasing network elements, and reselling retail services – will continue to be viable in the absence of enforcement of that provision.

Requiring a mature wholesale market prior to forbearance from the requirements of sections 251(c) and 271 would call for an inquiry into whether a BOC retains market power in the market for the wholesale provision of the network elements needed to provide competitive local service. If competitors cannot obtain what they need to serve customers from other sources, then the BOCs retain market power. Moreover, new entrants must be able to obtain network elements of comparable quality at prices similar to those the BOCs impute to themselves – that is, cost-based prices – and be able to obtain those elements quickly. Moreover, as we demonstrated in our Triennial Review Comments, new entrants seeking to serve mass market customers need access to the platform of network elements, not just individual elements.

Furthermore, such an inquiry must be conducted on a record that focuses on a specific geographic market. Although it is doubtful that forbearance currently is warranted anywhere, it seems clear that alternative sources of supply of the network elements needed to provide competitive local service will become available in different markets at different times. Accordingly, determining whether a mature wholesale market exists and whether the BOC retains market power is a highly fact-specific inquiry. Verizon, of course, has completely failed to make the sort of granular inquiry that is necessary in its skeletal forbearance petition.

The conclusion that a mature wholesale market should exist prior to forbearance from the requirements of sections 251(c) and 271 follows from the terms of the provision. The ability of competitors to lease network elements at cost-based rates is set forth – indeed, reiterated – in those two provisions.[47] So are interconnection and resale rights.[48] Thus, the common denominator between the two provisions that Congress singled out for heightened forbearance scrutiny is their repeated emphasis on the availability of each of the three modes of competitive entry. As a matter of textual analysis, it therefore makes sense to conclude that those provisions have not been fully implemented until competition has taken root so that the market will provide for entry by each mode in the absence of regulatory oversight.

As a matter of policy, our construction of section 10(d) also makes sense. The Commission has described the long-term goal of the Telecommunications Act as "creating robust competition in telecommunications," which it aptly described as "competition among multiple providers of local service that would drive down prices to competitive levels."[49] It would be contrary to that goal to deregulate carriers that continue to possess market power. Indeed, deregulation of carriers with market power is wholly inconsistent with section 10's statutory prerequisites. As the Supreme Court recently explained, the Act is deregulatory "in the intended sense of departing from traditional 'regulatory' ways that coddled monopolies."[50] It would go beyond coddling to forbear from the requirements of sections 251(c) and 271 at this time, when

[47] Section 251(c)(3) requires ILECs to provide unbundled access to network elements on nondiscriminatory terms and in accordance with the requirements of section 252. Section 271(c)(2)(B)(ii), (iv), (v), & (vi) require BOCs to provide unbundled access to loops, transport, and switching at cost-based rates in accordance with the pricing rules in section 252(d)(1).

[48] Interconnection rights are established in section 251(c)(2) and section 271(c)(2)(B)(i). Resale rights are established in section 251(c)(4) and section 271(c)(2)(B)(xiv).

[49] *UNE Remand Order*, *supra*, at ¶ 55.

[50] *Verizon*, 122 S. Ct. at 1668 n.20.

the BOCs continue to possess market power. Congress instead mandated full implementation of sections 251(c)(3) and 271 prior to forbearance from enforcement of those provisions.

The existence of an established wholesale market will ensure that deregulation will not have the effect of reinstating the incumbents' market dominance. It instead will ensure that competition is irreversibly established. It also will create parity with respect to entry into the local and interexchange markets. A mature wholesale market currently exists in the interexchange market, so new entrants to that market such as Z-Tel and Verizon may quickly obtain the capacity they need for the interexchange component of their offerings. The purpose of section 271, of course, was to create parity: "You can get in my business when I can get in your business."[51] At present, new entrants may enter the local market on account of the availability of the platform of network elements. But if the platform were not available, the parity that justifies the grant of a section 271 petition would no longer exist.[52]

Accordingly, the Commission should conclude that the unbundling provisions in sections 251(c)(3) and 271 have been "fully implemented" within the meaning of section 10(d) when new entrants to the local exchange and exchange access markets may rely on wholesale markets to obtain the network elements they need to compete. Although Verizon has cured the procedural defect to its request for forbearance, on the merits its request remains defective by failing even to attempt to grapple with the requirements of section 10.

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[51] 141 Cong. Rec. S8,153 (daily ed. June 12, 1995 (statement of Sen. Breaux).

[52] The Commission has consistently relied on the existence of competition from companies using the platform of network elements, including Z-Tel, to satisfy the "Track A" requirement that the BOC face competition from a "facilities-based" competitor. *See, e.g.*, *Vermont 271 Decision*, *supra*, at ¶ 11.

CONCLUSION

The Petition for Forbearance should be denied.

Respectfully submitted,

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